

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 9:19-cv-81231

SUSAN SHELLY,

Plaintiff

(Formerly County Court, Fifteenth Judicial
Circuit in and for Palm Beach County, Florida
Case No. 50-2019-CC-010718-XXXX-MB)

v.

TARGET CORPORATION,

Defendant.

DEFENDANT TARGET CORPORATION'S NOTICE OF REMOVAL

Defendant, Target Corporation ("Target"), through its undersigned attorneys, and pursuant to 28 U.S.C. §§ 1446 and 1332, hereby files this Notice of Removal and removes to the United States District Court for the Southern District of Florida an action which is pending in the County Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

A. PROCEDURAL BACKGROUND

1. On or about August 14, 2019, Plaintiff Susan Shelly ("Plaintiff") filed a Complaint in the County Court of the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida (the "County Court"), captioned SUSAN SHELLY vs. TARGET CORPORATION (the "Complaint"). The action was assigned Case No. 50-2019-CC-010718-XXXX-MB.

2. Plaintiff effectuated service of the Complaint on Defendant no earlier than August 15, 2019. Pursuant to 28 U.S.C. § 1446(a), a true and correct copy of all process and pleadings

served as of this date is attached hereto as **Composite Exhibit 1**. These documents consist of Plaintiff's Summons and Complaint and the remainder of the County Court file.

3. The Complaint asserts a single cause of action under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), §§ 501.201 *et seq.*, Florida Statutes, and seeks damages, attorney's fees (per statute), costs, declaratory judgment, and injunctive relief. Compl. ¶ 1, Count I.¹

4. According to the Complaint, Plaintiff is a resident of Palm Beach County, Florida. Compl. ¶ 2. The Complaint alleges that Plaintiff² purchased an herbicide branded Roundup® (the "Product") from a Target store located in Delray Beach, Florida. Compl. ¶ 5. Plaintiff further alleges that the Product, which contains the active ingredient glyphosate, is "deceptively labeled and marketed," and that if Plaintiff had known of the alleged carcinogenic properties of glyphosate, she would not have purchased it. Compl. ¶¶ 18-20.

¹ It must be noted, however, that Plaintiff alleges: "Accordingly, Plaintiff and all other consumers purchasing the Product at retail stores throughout Florida have been, are, and will continue to be aggrieved by a deceptively labeled and marketed product and by being deprived of the benefit of the bargain they reasonably anticipated from the Product labeling and lack of proper warning label" (Compl. at ¶ 21) and "Plaintiff is entitled to bring this Action for declaratory and injunctive relief for the benefit of themselves and all other consumers throughout Florida who have been, are, and will be aggrieved by the Product, pursuant to section 501.211(1), Florida Statutes" (*id.* at Count I, ¶ 5). Throughout the Complaint, Plaintiff interchangeably uses plural pronouns, as well as singular pronouns, exacerbating the lack of clarity relating to Plaintiff's claim. Further, Defendant understands that Plaintiff's counsel also has been involved in the filing of similar class actions against other retailers. *See Weeks v. Home Depot U.S.A., Inc.*, Case No. 2:19-cv-6780 (C.D. Cal., filed on August 5, 2019); *Weeks v. Lowes Home Centers, LLC*, Case No. 2:19-cv-6828 (C.D. Cal., filed on August 6, 2019); *Jewell v. Walmart, Inc.*, No. 4:19-cv-04088-SOH (W.D. Ar.) (filed Aug. 12, 2019).

² The Complaint actually alleges that a person named "Aimee Water" purchased the Product. Compl. ¶ 5. Target assumes this was a mistake, but reserves its right to argue that it renders the Complaint deficient.

B. JURISDICTION

5. This Court has original jurisdiction over this action under 28 U.S.C. § 1332(a) because this matter is between citizens of different states within the meaning of that provision and the amount in controversy exceeds \$75,000.

C. VENUE

6. This action was filed in the County Court of the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida. Venue properly lies in the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. §§ 89(c), 1391(a), and 1441(a).

D. SERVICE ON THE STATE COURT

7. Pursuant to 28 U.S.C. § 1446(d), contemporaneously with the filing of this Notice of Removal in the United States District Court for the Southern District of Florida, written notice of such filing will be given by the undersigned to Plaintiff's Counsel of Record and a copy of the Notice of Removal will be filed with the Clerk of the County Court, Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

E. REMOVAL IS TIMELY

8. This removal is timely. Plaintiff served Defendant with the Complaint no earlier than August 15, 2019. This removal is therefore made within 30 days of the service of the Complaint on Defendant.

F. NO ADMISSION

9. By this filing, Defendant does not admit any liability, does not concede the accuracy of Plaintiff's allegations, and does not concede that Plaintiff is entitled to any of the relief sought in the Complaint, or any relief of any kind. To the contrary, Defendant denies the accuracy of Plaintiff's allegations and denies that Plaintiff is entitled to any of the relief sought.

G. ORIGINAL DIVERSITY JURISDICTION PURSUANT TO 28 U.S.C. § 1332(a)

10. This Court has original jurisdiction over the matter pursuant to 28 U.S.C. § 1332(a). Under Section 1332, federal courts have original jurisdiction of “all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different states . . .” 28 U.S.C. § 1332(a)(1). Both requirements are satisfied here.

H. DIVERSITY OF CITIZENSHIP IS SATISFIED

11. Plaintiff alleges that she is a resident of Palm Beach County, Florida and made purchases from a Target store in Delray Beach, Florida. Thus, upon information and belief, Plaintiff is a citizen of the State of Florida, and is not a citizen of Minnesota.

12. Defendant is a corporation incorporated under the laws of the State of Minnesota, and has its corporate headquarters, where its officers direct, control, and coordinate the corporation’s activities, in the State of Minnesota. Thus, Defendant is a citizen of Minnesota—where it is incorporated and has its principal place of business—and not Florida.

13. Because Plaintiff is a citizen of Florida and Defendant is a citizen of Minnesota, the Action is between citizens of different states under the definition of 28 U.S.C. § 1332. Therefore, diversity is established.

I. THE AMOUNT IN CONTROVERSY IS SATISFIED

14. As discussed herein, the amount placed “in controversy” by the allegations of the Complaint is in excess of \$75,000 in (a) actual damages and (b) plaintiff’s attorney’s fees.

15. The Complaint alleges violation of FDUTPA, and seeks attorney’s fees and court costs in addition to actual damages. Compl. ¶ 1; *see* Fla. Stat. Ann. § 501.211 (providing that, in “any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney’s fees” and court costs). The Complaint seeks

“actual damages of no more than \$5,000” as well as “attorney’s fees and costs.” Compl. ¶ 1 (emphasis added). Plaintiff further alleges “Plaintiff has and will incur reasonable costs and attorney’s fees in pursuit of this Action.” Compl., Count I ¶ 8. Plaintiff seeks an award of “Plaintiff’s actual damages, costs, and reasonable attorney’s fees pursuant to section 501.211(2), Florida Statutes.” Compl., *ad damnum* clause.

16. When, as here, a statute authorizes the recovery of attorney’s fees, and the plaintiff has requested attorney’s fees, a reasonable amount of those fees is included in the amount in controversy. *See Moshiach Cmty. Ctr. 770, Inc. v. Scottsdale Ins. Co.*, 2018 WL 6308671, at *2 (S.D. Fla. Jan. 23, 2018) (citing *Morrison v. Allstate Indemnity Co.*, 228 F.3d 1255, 1265 (11th Cir. 2000)). *See also DO Restaurants, Inc. v. Aspen Specialty Ins. Co.*, 984 F. Supp. 2d 1342, 1345 (S.D. Fla. 2013). Courts in the 11th Circuit (including this Court) have held that, when the plaintiff seeks attorney’s fees authorized by statute, the amount in controversy includes a projected reasonable amount of attorney’s fees **through trial**. *See, e.g., Moshiach*, 2018 WL 6308671 at *2; *Parker v. Scottsdale Ins. Co.*, No. 18-24340-CIV, 2019 WL 409039, at *2-3 (S.D. Fla. Feb. 1, 2019). *See also Fritsch v. Swift Transportation Co. of Arizona, LLC*, 899 F.3d 785, 794 (9th Cir. 2018). *Contra Greene v. Columbian Life Ins. Co.*, No. 18-21819-CIV, 2018 WL 8224886, at *3 (S.D. Fla. June 15, 2018); *Bender v. GEICO Gen. Ins. Co.*, No. 8:17-CV-872-T-33TBM, 2017 WL 1372166, at *1 (M.D. Fla. Apr. 17, 2017).

17. In this case, based upon previous filings by Plaintiff’s counsel regarding his hourly rate, generally prevailing hour rates for similar cases, the anticipated litigation activity that would be required to take this case through trial, experience and common sense demonstrate that Plaintiff

seeks attorney's fees in excess of \$75,000. *See* Declaration of John J. Rosenthal in Support of Defendant Target Corporation's Notice of Removal ¶¶ 8-17.³

18. Litigation of this claim through trial will require significant activity, including discovery and depositions regarding the labeling claim, motion practice, and other litigation activities. *See id.* ¶¶ 8-10. Furthermore, trial of this matter is likely to be exceedingly complex. For example, Plaintiff alleges that the product is "deceptively marketed" because its active ingredient, glyphosate, is a carcinogen. Thus, Plaintiff would bear the burden to prove at trial that glyphosate is in fact a carcinogen. Such proof would require extensive scientific evidence, likely including testimony from toxicologists, epidemiologists, genotoxicologists, and consideration of hundreds of studies regarding glyphosate's safety and an extensive regulatory record. *See, e.g.*, Rosenthal Decl. ¶¶ 6, 8-10, Ex. C (227-page EPA position paper on noncarcinogenicity of glyphosate, referencing hundreds of studies). Proof of these highly technical and specialized claims will require substantial cost in attorney time for expert discovery, preparation of expert reports, defending and taking opposing expert depositions, and preparing for expert testimony at trial. *See id.* ¶¶ 6, 8-10. All of these activities will easily generate over \$75,000 in attorney's fees in this matter.

19. As a practical matter, because of Plaintiff's request for injunctive relief and the provision for the award of attorney's fees to the prevailing party under the Florida Deceptive and

³ Target is not required to provide evidence regarding the amount in controversy until either Plaintiff or the Court questions its allegations. *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 135 S. Ct. 547, 553-54 (2014) (holding that "defendants may simply allege or assert that the jurisdiction threshold has been met" and need not present any evidence unless "the plaintiff contests, or the court questions, the defendant's allegation"). Nonetheless, Target submits the Rosenthal Declaration, and its exhibits, in an abundance of caution.

Unfair Trade Practices Act, both parties are incentivized to vigorously litigate this case. *See id.* ¶¶ 9-10.

20. Accordingly, the requisite amount in controversy for diversity actions set forth in 28 U.S.C. § 1332(a) is satisfied. As complete diversity and the jurisdictional amount have been met, this action is removable pursuant to 28 U.S.C. § 1332.⁴

21. Per *Dart Cherokee*, the appropriate procedure if Plaintiff or the Court questions the jurisdictional allegations in this Notice of Removal is for the Court to permit discovery on the issue and accept evidentiary submissions from both sides. *Dart Cherokee*, 135 S. Ct. at 553-54.

WHEREFORE, Defendant respectfully requests that the aforesaid action now pending in the County Court, Fifteenth Judicial Circuit in and for Palm Beach County, Florida, be removed to this Honorable Court.

Respectfully Submitted,

/s/ Cristina I. Calvar

Cristina I. Calvar [Fla. Bar No. 114201]
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166
Tel: (212) 294-6700
Fax: (212) 294-4700
CCalvar@winston.com

Attorneys for Defendant

⁴ Because the actual damages claimed and attorney's fees and costs claimed alone exceed the jurisdictional amount, Defendant does not herein discuss the additional amounts that may be included in the calculation of the amount in controversy, including the monetary value of the declaratory relief and injunctive relief sought, but reserves the right to do so.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Notice of Removal was served via electronic means through the Florida Court's e-filing portal and by email upon:

- (1) Howard W. Rubinstein, Esq., THE LAW OFFICE OF HOWARD W. RUBINSTEIN, 1281 N. Ocean Dr., Apt. 182, Singer Island, FL 33404, howardr@pdq.net; and
- (2) Clerk of the Court, County Court, Fifteenth Judicial Circuit in and for Palm Beach County, Florida,

this 4th day of September 2019.

/s/ Cristina I. Calvar

Cristina I. Calvar [Fla. Bar No. 114201]
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166
Tel: (212) 294-6700
Fax: (212) 294-4700
CCalvar@winston.com

Attorneys for Defendant